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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 253

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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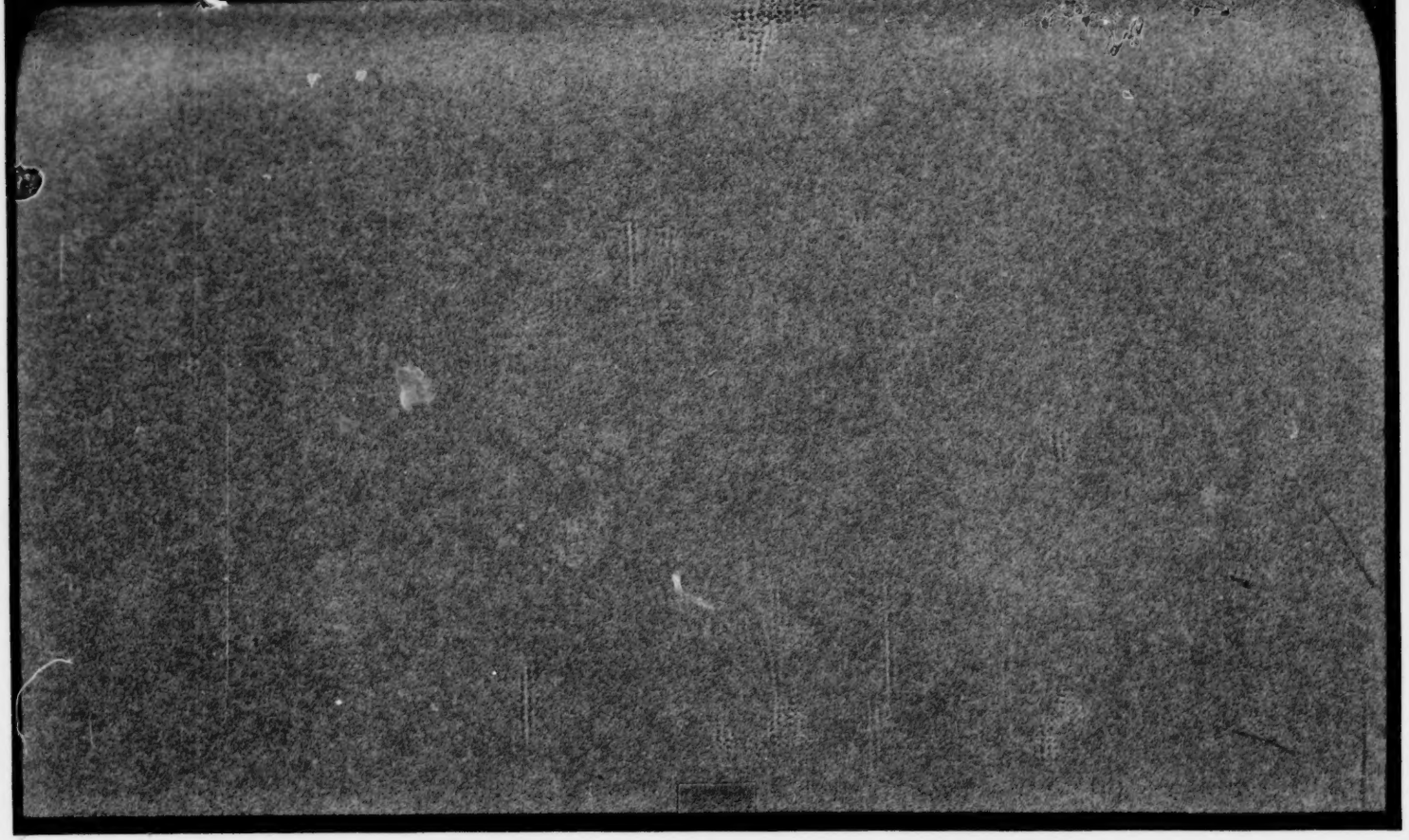

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LOUIS E. WOLCHER, *Petitioner*

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 28, 1954.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported in 218 F. 2d 505, and is printed in Appendix A.

The opinion of the Court of Appeals in an earlier phase, reversing a conviction on the same indictment and remanding for a new trial, is reported in 200 F. 2d 493, and is printed in Appendix B.

No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 28, 1954, R. 511. Rehearing was denied

on March 16, 1955, R. 513. An order dated April 9, 1955, signed by Mr. Justice Douglas, extended the time for filing petition for a writ of certiorari to and including May 14, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

On a trial for income tax evasion, the Government proved and petitioner Wolcher admits that in 1943 he received prices over legal ceilings for whisky. His defense is that he had to pay over-ceiling prices on his purchases and realized no net income on the transaction.

The critical testimony is Wolcher's statements that he paid for the whisky by ceiling payments to the shipper, and by over-ceiling payments to one Gersh, his contact in arranging the purchases. He testified that in addition to certain payments made to Gersh by check he sent large sums of cash to Gersh, by mail and express, without receipts or records.

At a previous trial the Government presented Gersh as a rebuttal witness. Gersh admitted receipt from Wolcher not only of some moneys paid by check but also of certain large sums sent by Wolcher to Gersh in cash. These cash receipts were identified as deposits on Gersh's Corn Exchange Bank bank records (i.e. the bank records of the "Cash Box", a trade magazine published by Gersh). These bank records were introduced as exhibits by the Government and also made available to the defense for exhibits.

Gersh contended he had been given the cash money to purchase pinball machines and phonographs, that pinball machines could not be acquired unless the purchaser was armed with the full cash payment in advance; that he had been unable to make purchases as requested and had therefore promptly returned to Wolcher in cash each of the shipments of cash funds which had been received from Wolcher, except in the last instance when he had been able to purchase ten phonographs for Wolcher. The trial court

excluded Wolcher's rebuttal documentary evidence showing that pinball machines were not then in short supply requiring cash payment in advance of shipment, and that Gersh had not in fact arranged the purchase of the phonographs. The Court of Appeals reversed and remanded, in part because of the actions of the trial court in excluding that documentary evidence. *Wolcher* v. *United States*, 200 F. 2d 493, Appendix B.

On the second trial, the Government subpenaed Gersh, but released him, without notice to petitioner, before defense completed its case. The prosecuting attorney frustrated the efforts of defense counsel to identify and introduce Gersh's bank statements which had been exhibits at the previous trial. The prosecuting attorney urged that there was no materiality in the records of a stranger to the trial. The Treasury Agent in charge of the investigation, who had attended the first trial, professed he had not seen these bank statements in the course of either the investigation or the first trial, and the prosecuting attorney professed that he had no knowledge of these exhibits or of any part of the first trial. That these statements were lacking in candor is shown below.

Defense counsel was thus unable to identify the corroboratory bank statements and perforce rested his case. The Government rested its case forthwith, although it had previously stated it would have rebuttal. A short recess from 10:30 a.m. to 1 p.m. was called to enable counsel to prepare argument to the jury. As the first order of business after resting of the case, defense counsel advised the trial court that he had just learned that Gersh was actually in San Francisco. The prosecuting attorney stated that Gersh had been notified that he was not to appear but that nonetheless he was in town. Defense counsel asked that the case be reopened to provide an opportunity to produce Gersh and thus identify the Gersh bank records. This was denied on the ground that the application was not timely, and that defense counsel could have subpenaed Gersh before. Defense counsel stated that he had not

anticipated the prosecution's tactics circumventing indentification of the bank records.

The prosecuting attorney presented the case to the jury on the ground that petitioner's story of shipments of large sums of cash to Gersh was unsupported and fabricated. This was done notwithstanding the fact that Wolcher's testimony in this respect had been corroborated at the first trial not only by Gersh's oral testimony but by the documentary bank records.

In the light of the foregoing facts and tactics, and viewing the following questions both singly and cumulatively, the questions presented are:

1. Was there grievous misconduct on the part of the prosecution, and a failure to comply with the Government's obligations in regard to evidence in its control corroborating the accused taxpayer in a vital respect,—

(a) In the prosecuting attorney's presentation to the jury on the ground that petitioner's testimony of cash shipments to Gersh was unsupported and fabricated when that fact had been established at the first trial by Government witness Gersh and his bank records.

(b) In frustrating defense counsel's efforts to identify the corroborating bank records, by the foregoing testimony by the revenue agent in charge of the investigation, objections and statement as counsel by the prosecuting attorney, all lacking in candor, and relating to matters they both knew and were chargeable with knowing.

(c) In the prosecution's tactics to circumvent the presentation of Gersh or his bank records at the second trial: by subpenaing Gersh and releasing him from subpena, without notice to defendant, while defense was putting on its case, by failing to call Gersh in rebuttal as at the first trial, and by objecting to

defense counsel's effort to reopen the case to call Gersh to identify his bank records.

2. Was there prejudicial failure to exercise sound discretion in the interest of justice when the trial judge (a) denied the application of defense counsel to reopen the case in order to provide an opportunity to produce Gersh to identify the vital bank documents, the application having been made prior to the opening to the jury, and promptly after defense learned that Gersh was in fact in town; and (b) thus penalized petitioner because of defense counsel's failure to anticipate the prosecution's tactics described above.

3. Was there prejudicial error in the charge in making the verdict turn on the jury's belief *vel non* in defendant's testimony, and in effect instructing the jury to convict unless they believed in defendant's testimony.

STATUTE INVOLVED

26 U.S.C. sec. 145(b), Internal Revenue Code, sec. 145(b) (as in effect prior to the Internal Revenue Code of 1954) reads:

> "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to the penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution."

STATEMENT

1. Background as Referred to by Court Below

As the court below noted (R. 504) the background of the case is developed in its earlier opinion (Appendix B) and may be succinctly stated by quoting an excerpt from that opinion:

> "The appellant was convicted under an indictment charging that he wilfully and knowingly attempted to evade and defeat some $30,000 of the income and victory taxes due and owing by him for the fiscal year ending June 30, 1944, in violation of sec. 145b of the Internal Revenue Code * * *
>
> "The theory of the Government's proof was that during the year in question Wolcher collected large sums from the sale of whisky from which he derived income which he failed to return. The sales were made through San Francisco liquor wholesalers who would receive checks for the ceiling price of the liquor while the purchaser would pay an additional over ceiling amount in cash which went to Wolcher. His income tax return reported no gross income from sales of liquor at wholesale (which the sales above described were) except for an item of $3,000 profit made on a transaction not involved here.
>
> "Wolcher admitted the over-ceiling transactions, but contended that although he received those proceeds he made no profits from these operations for the reason that in purchasing or acquiring the liquor, he himself was obliged to make over-ceiling payments or bonuses in a large amount, and that the sums so paid wiped out any possible profit. He testified that the amounts so laid out by him were paid to one William Gersh, stating that on some shipments the over-ceiling bonus paid Gersh amounted to $20 and on others to $25 a case. He fixed the amount which he had thus paid Gersh as approximately $115,000. Gersh was the publisher of a New York City trade paper called "The Cash Box" devoted entirely to coin machines. Wolcher operated a concern which sold coin operated machines and he had known Gersh for 15 or 20 years. Wolcher testified that he sent substantial sums of money to Gersh during the period in question and that these

remittances were made by check and by cash either through the mail or by express or delivered to Gersh in person.

"Gersh was called as a rebuttal witness for the Government and while he stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher. His testimony was that at that time coin machines were very difficult to procure, and that they could be bought only by cash payment in advance o tfhe full purchase price. This, he said, was why Wolcher sent him these sums of money. He testified that he bought ten phonographs for Wolcher during this period, the purchase amounting to $5250, but that he had returned all the balance of the $85,000 to Wolcher."

2. Government's Witnesses at Second Trial

The Government's proof of understated income in this case consisted of testimony that over-ceiling payments for whisky were made direct to Wolcher himself or were made to other persons who passed the money on to Wolcher.

Some 5,000 cases of liquor were involved, which petitioner received from three San Francisco licensed liquor wholesalers. The great bulk of the whisky was sent in six shipments from the East Coast to two of these wholesalers: George Barton Co. and Franciscan Distributing Co. There was also a seventh shipment through Rathjen Bros.

Attention is called to portions of the testimony of the Government's witnesses which indicated that the liquor in question had been obtained by petitioner through over-ceiling payments.

Thus, Samuel Weiss (of Franciscan) testified: In 1943 Wolcher had a few taverns we supplied with liquor. He asked for more whisky, and I told him it was impossible since sources of whisky for distributors were drying up, and that if he wanted more whisky he would have to get it and we would handle the importing as an authorized wholesaler at $2 a case. Wolcher said he could make a few connections in the East through people in the same busi-

ness, and he made arrangements for shipments to our firms from eastern distilleries (R. 122ff, 140-142).

James Oligny testified that in 1943 it was impossible even for wholesalers like his firm, George Barton Co., to get supplies from usual distiller sources. However, Cy Owens made an arrangement for liquor to be shipped to Bartons from the East, and the wholesaler's permitted margin was divided three ways between Barton, Owens and petitioner (R. 100ff).

Owens testified that he owned two taverns together with relatives of petitioner, that whisky was hard to get but petitioner said he had a friend who could get some (R. 75, 85). In the Bay Area whisky was not available except at over-ceiling prices (R. 85-6). Owens received payment from petitioner and transmitted it to George Barton Co. (R. 88). Deliveries were made at ceiling to Owens' bar and were made in part to bars owned by petitioner or his relatives. Owens had nothing to do with any other purchasers (R. 80ff).

Other purchasers, tavern operators, testified they paid over-ceiling prices. Thus Fred Rocci and Pete Cavigla testified they paid $60 a case to one Roy Clemens, the retail ceiling price (slightly in excess of $30) by check and the balance in cash. They had Clemens' pinball machines on location in their taverns. They threatened to switch their machine business from Clemens to a competitor who was offering black market whisky at $60 a case unless Clemens could provide liquor necessary to keep the taverns in operation. (R. 157-166, 210-216.) Clemens testified he went to petitioner from whom he purchased machines and said he needed whisky for survival of his machine business. Petitioner said he would see what he could do. Two months later petitioner said he knew where whisky was available, that Clemens and his customers would have to pay black market prices, and that petitioner wasn't making a dime out of it (R. 291-4). In other cases the arrangements were made with petitioner by Pete Norman

and John Kirby, who had long purchased their machines from petitioner (R. 195ff, 268ff).

About 10 per cent of the whisky involved in this case, 500 cases of Old Brook, was sold by Rathjen Bros. to the "Gold Coast" (a tavern owned by Wolcher) allegedly for $25,950 (Hammerly, R. 46). Xavier Grusenmeyer who testified as to some cases sold for cash over-ceiling, said that petitioner told him this was because he had to pay money over the ceiling price to get the whisky (R. 68). Vance Hammerly, auditor for Rathjen's, testified that the company was so short of liquor that it instituted allotments of whisky among its 5000 customers in accordance with previous purchase volumes (R. 311), that however, that was not done in the case of these 500 cases sold to Gold Coast (R. 315), that this whisky was high-priced, and that these were not handled by Rathjen's general commission salesmen but by a house salesman, Ray Worthy (R. 317).[1]

3. Evidence of Defendant

Defendant Wolcher testified: I did not report the overage I received on sales of whisky on my income tax return because the overages I received were approximately equal to overages which I had to pay (R. 366).[2] (Petitioner reported income of $66,900. The Government contends his income was $102,000. R. 25.)

In 1943 I made efforts to get whisky for the taverns belonging to me and my relatives, that was my original motivating thought, and it spread into helping out customers

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[1] Rathjen's ledger sheets (Deft's. Exh. C and D) show that for months before and after this sale to the Gold Coast in May, 1943, the largest sale by Rathjen for any month to either Gold Coast or Silver Rail Taverns never exceeded $600 in round numbers. In contrast here was a sale for $25,950.

[2] The overages paid out by Wolcher applied to 5000 cases of whisky. Approximately 1500 cases were resold, to taverns owned by Wolcher, his relatives and a few friends, at retail ceiling. The balance was sold to outsiders at overceiling prices (R. 410-411).

and friends (R. 409, 418). Later, when I saw how this was expanding into friends of friends and large volumes, I stopped it (R. 411). In my efforts to get whisky for our bars, I contacted wholesalers, advertised in the papers (Deft. Exh. E), but all without success (R. 385-397). I acquired whisky by paying over-ceiling prices, the same whisky I sold at prices over-ceiling. Clemens, Norman and Kirby were customers of mine in the coin-operated machine business (R. 348). That includes cigarette vending, gun vending, pinball, phonograph, etc., machines and slot machines until their possession became illegal (R. 345).

For the purpose of acquiring whisky from the East, I contacted Williams Gersh, who published a coin machine paper (R. 353-4). I first had a talk with Gersh about whisky in the spring of 1943 (R. 355).[3] As a result I sent Gersh during 1943-1944 close to $150,000. I sent him $5000 in June 1943 for use in making the payment that the whisky cost over and above its regular invoice price (R. 358). As a result the first shipment of whisky arrived from the East through Franciscan Co. (R. 359).

I sent the money to Gersh in various ways: I would issue a check and buy a bank draft for it; or I would buy a bank draft for cash without having issued a check; or I would send the money to him in cash by mail or express, or if I saw him I would deliver it to him either in cash or by check (R. 359-360).

I definitely recall sending the following payments to Gersh, all to be applied against the overage of the whisky (R. 361).

$5,000 in June 1943 (R. 358). I drew a check upon my bank account (Deft's Exh. E, R. 370) and purchased a bank draft which I sent him (R. 363).

$3,300 cash in the middle of August 1943 (R. 359).

$5,000 at the end of August 1943, in cash by mail (R. 461).

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[3] Wolcher was asked what conversation he had with Gersh. The Government's objection was sustained (R. 355-6).

$12,500 by cashier's check dated September 29, 1943 (Deft's Exh. I), which I purchased for cash (R. 378-9).

$60,000. Of this amount $30,000 was in cash and $30,000 was in a bank draft, which I delivered to him in New York in November, 1943 (R. 360-361); Deft's Exs. F, R. 371-2).

$30,000 cash by express in December or January 1944 (R. 362).

$3,000 which I gave Gersh in New York in 1944 for the purpose of winding up our transactions (R. 367-8).

And there were a number of mailings of $1,000, $12,000, $1,500 apice, mailed to Gersh (R. 404).

In my first arrangement with Gersh I was to pay him $20 a case overage above ceiling. Then he increased it to $25 a case (R. 361-2).[4] The cash I sent Gersh I got from the sale of the whisky (R. 364).

During this period I received money back from Gersh in accordance with our understanding for those instances when I sent him money by check. I entered the original $5000 on my books as a suspense item, Bill Gersh. When he returned the $5000 check we put it in the bank account and cancelled the entry (R. 364). In November 1943 I didn't have enough over-ceiling money to send the required cash and I borrowed $30,000 to pay him by bank draft. That was the same, for all practical purposes, as a check on my bank account. He was to return that money to balance off my books (R. 380).

I received back from Gersh approximately $35,000—never by cash. I received a check for $5,000 dated August 13, 1943 (Deft. Exh. G, R. 374); a check for $22,750, dated February 1, 1944 (Deft. Exh. H, R. 375); a check for $2,000 received from his wife (R. 379; Deft. Exh. J. R.

[4] There is no dispute that if petitioner had to pay an overage of $20-$25 a case for whisky, he made no profit on the whisky transactions.

383). And at my suggestion Gersh paid a payment of $5,250 to Runyon Sales Co. for some phonographs I had purchased (R. 376-7).

Petitioner testified that he kept no books as such on these transactions and only a brief memorandum record at that time (R. 382). Upon cross-examination it was brought out that except for the checks Wolcher had no record of the money sent to Gersh. Mail was sent not registered (R. 404), money sent express was insured for a nominal sum, was not described as money and no receipt was obtained (R. 403). Petitioner's record at that time was in the form of a simple pocket memo of how much was owing as of the time of any shipment, and he disposed of the earlier memo so as to avoid unnecessary records involving a black market commodity (R. 382, 437-439). The instances that involved a written record, because checks were used, were covered up so as to avoid showing a whisky transaction (R. 405).

As to the purchase from Rathjen Bros., Jack Kent, who then managed Gold Coast cafe, testified (R. 335-7) that when he asked Ray Worthy, salesman for Rathjen's, for additional stock Worthy told him there were 500 cases available of Old Brook, a new bonded whisky, if an additional price were paid under the table; that he put Worthy in touch with petitioner. Kent was led to understand the excess price was $20 a case, but Worthy didn't say that in so many words and Kent didn't negotiate with Worthy (R. 338). Petitioner testified that he made an over-ceiling payment of $10,000 cash to Worthy (R. 349).

4. Tactics and Rulings Frustrating Presentation by Defense of Evidence of Receipt of Cash by Gersh

At the second trial the Government took the following steps to circumvent the presentation of evidence of receipt of cash by Gersh. The Government subpoenaed Gersh as a witness, but rested its case without calling him in rebuttal:

a. Defense counsel (Mr. Friedman) called Richard Appling, the special agent in charge of the investigation of petitioner's tax return, and asked whether he had occasion to procure a copy of Gersh's bank account. Mr. Schnacke, the prosecuting attorney, objected on ground of lack of materiality in the bank account of a stranger (R. 464). The court permitted the question for the time being. Appling answered he did not procure that account during the course of his investigation (R. 465). Mr. Friedman asked Appling to identify the document which was Government's Exhibit 37 at the first trial (later marked Deft's. Exhibit O for identification, R. 472). Appling answered he had never seen it before the first trial, he saw it after the conclusion of the first trial (R. 466). Defense counsel then asked whether photostats of that document were not procured in the course of the investigation under Appling's charge. Mr. Schnacke's objection was sustained (R. 466).

b. Defense counsel then asked Mr. Schnacke to take the stand so that he could ask him about these bank account records. Mr. Schnacke said he would be "tickled" to take the stand but added (R. 467):

> "Mr. Schnacke: I don't have any knowledge of those. I wasn't here at the first trial. I don't know anything about it, about any part of it.
> "Mr. Friedman: Well, all right, if you don't know anything about it, I won't call you." (R. 407)

c. Defense counsel rested and the Government rested forthwith without calling any rebuttal witnesses. The previous trial day (Thursday) the prosecuting attorney informed the court that he had witnesses in rebuttal, who were all noticed for Monday, and the court recessed until Monday (R. 457-8). When the Government rested, the court recessed from 10:30 a.m. to 1 p.m. when counsel were to begin argument to the jury. Mr. Friedman stated that in the interim he had been advised that Gersh was in fact in San Francisco, that if so he would be the best witness

to identify the bank accounts, that these bank documents were of vital interest, and asked that the case be reopened so that defense would have an opportunity to produce him (R. 468-9). Mr. Schnacke stated that Gersh had been subpoenaed by the Government, but that on the previous Friday, August 28, Gersh "was notified that he was not to appear. Nonetheless he appears to be in town." Mr. Schnacke said he had determined this by means of investigation and that Gersh had not been in touch with the Government (R. 468-9).

The court agreed that the matter was material but denied defense counsel's application to reopen the case as not timely, stating that the case had been adjourned at 10:30 a.m. to allow counsel to prepare argument, that the case was now ready to go to argument. (R. 470-3.)

d. Mr. Friedman asked Mr. Schnacke to stipulate that the exhibits were the bank records of Gersh, having been introduced and identified as such by the Government at the last trial (R. 470). Mr. Schnacke stated he did not see any connection with the case, and that defense counsel could have subpoenaed Gersh. Mr. Friedman stated (R. 471) "I didn't think we would have any difficulty in establishing these documents in view of the fact that they are their documents, because the record shows that the Government examined Mr. Gersh." (R. 471) The court repeated that defense application regarding Gersh was not timely (R. 472-3). The Gersh bank statements were marked defendant's Exhibits O and P for identification.[5]

While reserving for later the argument as to the significance of these objections and rulings, it is appropriate

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[5] The record in No. 12992 shows that these were the Corn Exchange Bank ledger sheets of the account of the "Cash Box", a coin machine trade magazine published by Gersh (Record 12992, p. 558) which were brought into the case by the Government, as Government Exhibit 37; the balance was supplied to the defense for introduction as Defense Exhibit C (Record No. 12992, pp. 563, 585). These references to Record No. 12992 are set forth in Appendix C below.

to refer briefly to the significance of the evidence involved.

As is noted in the opinion in *Wolcher* v. *United States*, 200 F.2d 493, Appendix B, Gersh admitted receiving $85,000 from petitioner Wolcher, part by check,[6] and part in cash. Gersh's admission as to the receipt of substantial sums of cash were not only a matter of his oral testimony, but were established by his corroborating bank account records, as appears from the record at the first trial, which is before this Court.[7]

Thus that bank record provides documentary corroboration of the $3,300 cash receipt deposited August 11, 1943; the next $5,000 cash receipt, deposited August 31, 1943; the large receipt of $30,000 cash, deposited January 4,

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[6] Petitioner's payments by check were shown in Defendant's Exhibits E, F and I (R. 370-2, 378-9).

[7] Record No. 12992, U.S. Court of Appeals for the Ninth Circuit, has been duly certified by the Clerk of that Court and lodged with the Clerk of the United States Supreme Court.

That record is properly the subject of judicial notice in this proceeding. *Wells* v. *United States*, 318 U.S. 257, 260; *Alexander* v. *Hillman*, 296 U.S. 222, 231; *National Fire Ins. Co.* v. *Thompson*, 281 U.S. 331, 336.

It may be noted that the record in the first trial was referred to by the Government below and by the court of appeals to reject petitioner's claim of error in the ruling (R. 355) excluding his testimony of his conversation with Gersh.

The Government brief below, quoted from the record in the first trial (as to Wolcher's conversation with Gersh) to show that the record at the second trial in fact contained the substance of that conversation, and therefore the ruling excluding testimony as to that conversation (R. 355) was not prejudicial. (Brief, p. 22). The Court of Appeals affirmed, stating that since the substance of the conversation was in fact related by Wolcher there was no prejudice in the ruling (R. 509, Appx. A, p. 6a)

In regard to certain other matters, the Government brief below quoted from the first record (pp. 8-9); (and see footnote 4), and even referred on two points (pp. 6, 31) to Wolcher's brief on appeal from the first conviction. A certified copy of the Government's brief below is on file with the Clerk of the Supreme Court.

1944.[8] Gersh testified as to these, stating that Wolcher usually sent the money in cash, but claimed that he sent it back the way he had received it—by airmail, not registered.[9] The evidence at the first trial further shows that Gersh gave testimony as to these cash receipts from Wolcher to the revenue agents investigating the Wolcher case. In examining Gersh they called upon him to explain his deposits in the Cash Box bank account.[10]

5. The Charge to the Jury

The trial judge charged that the Government's case in essence was that petitioner's contention of sending large amounts in cash through the mail was fabricated and should not be believed (R. 483), that the issue is whether the jury did or did not believe the testimony and the story told by defendant (R. 483). He stressed that the jury could take into account the factors of the illegality of the transactions and the failure to keep books and records (R. 484).

6. Conviction and Recommendation of Leniency

The jury found defendant guilty, but recommended leniency (R. 6). The judge had made no reference to leniency recommendations in his charge and stated only that the matter of punishment is served exclusively for the judge (R. 476). Judgment was for two years' imprisonment and $10,000 fine (R. 19).

7. Appellate Proceedings

The court of appeals affirmed the conviction (R. 511), holding that the refusal of the district court to reopen the trial was within its discretionary authority, and that the

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[8] Record No. 12992, U. S. Court of Appeals for the Ninth Circuit, pp. 586-593, Appendix C, pp. 28a-33a.

[9] Record No. 12992, pp. 601-605, Appendix C, pp. 35a-37a.

[10] Record No. 12992, pp. 629-636, Appendix C, pp. 41a-44a.

charge, taken as a whole, did not err in failing to place on the Government its full burden of proof (R. 504ff).

Upon petition for rehearing, by leave of court, counsel for petitioner filed a separate supplementary statement. A certified copy is on file with the clerk. It was exclusively directed to the contention that the trial tactics of Government counsel constituted misconduct, which point had not previously been presented.

In its order denying rehearing, the court of appeals recited that its order was on consideration of the petition for rehearing and of the supplementary statement in support thereof. No opinion accompanied the order (R. 513).

REASONS FOR GRANTING THE WRIT

1. This is one of the infrequent criminal cases meriting review on certiorari. In terms of the conventional criteria for certiorari, we shall point out that the rulings below are contrary to the opinions of other circuit courts of appeals and in disregard of applicable decisions of this Court. But this petition rests on a broader base, and the entire case should be reviewed. It presents important questions of the administration of justice in criminal cases.

This petition presents several questions which cluster around a single core of injustice—that the prosecution sought and obtained a conviction on the basis that petitioner's testimony as to a critical fact (that he sent large sums of cash to one Gersh) was fabricated out of whole cloth, when the fact that such cash shipments were made was established by the Government's files and the record at the previous trial: petitioner's testimony was corroborated not only by Gersh, the Government's own witness at the earlier trial, but also by Gersh's bank records, documents of the highest integrity.

This Court should grant certiorari not only to review the departures from the accepted and normal course of proceedings detailed below and to correct the serious injustice in this case, but to speak out clearly on the im-

portant question of the Government's duty of fair dealing in criminal cases.

In *Holland* v. *United States*, 348 U.S. 121, decided December 6, 1954, this Court set forth the prosecution's duty to investigate taxpayer's explanations in "net worth" cases. This Court should now set forth the prosecution's underlying responsibility, which applies in all criminal cases, concerning the evidence obtained by the Government which corroborates taxpayer's account in a significant respect. The Government cannot be free to ignore such evidence, to deny knowledge of its existence, or to circumvent its introduction in the record.

Not only to correct the injustice to petitioner, but also to assure that future proceedings are properly conducted, it is important for this Court to enunciate with force and clarity the basic principles governing corroborative evidence. There is need for this Court to provide a beacon pointing to the prosecution's straight path of assisting in the presentation of a full record,—that justice shall be done. In this case the prosecuting attorney turned aside from that path. He not only failed to put before the jury evidence in the Government's possession corroborating the fact that petitioner sent cash to Gersh, he took steps calculated to keep that evidence out of the record. And he nailed down the conviction by the gross misconduct of assailing petitioner's testimony on this vital point (which the jury did not know was corroborated) as a mere fabrication.

Instead of illuminating the case by assisting in presentation of the full record, the prosecuting attorney beclouded and distorted the case. This established the conditions conducive to the trial judge's prejudicial rulings,—the refusal to reopen the case to permit petitioner to present the corroborative bank records, and a charge which induced the jury to convict if they did not believe defendant's apparently uncorroborated testimony.

The prosecution and the courts below sought to uphold their actions and rulings on the ground that defense coun-

sel could have protected his client. In effect they scored defense counsel for failing to anticipate the prosecution's unfair tactics.

For convenience, the questions arising out of the several occurrences at the trial are treated in separate paragraphs of this petition. Each of the prosecution tactics and judicial rulings complained of represents serious error. But attention is particularly called to their formidable cumulative impact on the jury, for they were all knit together into a single result,—that the jury convicted because it did not believe petitioner's (seemingly unsupported) testimony of cash shipments to Gersh.

The jury recommended leniency. There was no instruction that such a recommendation was permissible. The law makes no provision therefor. This leniency recommendation shows forcefully that the jury was uneasy in its verdict, and that the offensive tactics and erroneous rulings were highly prejudicial.

2. Consideration of the issues requires a capsule recapitulation of the basic facts and the posture of the case. Petitioner was convicted of wilfully attempting to evade income taxes. He admittedly received payments above OPA ceilings on certain sales of liquor. Petitioner's defense is that he realized no net income because he had to make equivalent payments above ceiling to purchase the liquor. (Petitioner testified that he was not in the business of selling liquor at wholesale, and that he bought the liquor over-ceiling in order to assure a supply for taverns owned by himself and relatives, and for taverns whose continuance was important to petitioner's customers in the coin machine business.)

Petitioner testified as to large over-ceiling payments made to William P. Gersh, and that these payments had been made partly by check but mostly by cash. He stated his definitive recollection of particular large shipments of cash by mail and express, without registration of mail or any other records or receipts,—of $3,300 in mid-August,

1943; of $5,000 in late August; of $30,000 in December or January, 1944. (See pp. 10-11 above)[11]

The record at the first trial is before this Court.[12] The evidence at the first trial showed that Wolcher had sent large sums of cash to Gersh that way. Government witness Gersh corroborated that Wolcher usually mailed or sent him money by cash in ordinary envelopes, without receipt or registration. These cash transfers were verified by the records of deposits in Gersh's "Cash Box" (trade magazine) account in the Corn Exchange Bank. At the first trial that bank record was brought into the case by the Government as Government Exhibit 37, and the balance was supplied to the defense for introduction, as Defendant's Exhibit G. It provided documentary corroboration of petitioner's account, as indicated by the following:

Petitioner's testimony of cash shipments to Gersh. Record No. 14109. (See pp. 10-11 above).	*Gersh's bank account record of cash deposits. Record No. 12992. (See Appendix C, pp. 27a-29a).*
$ 3,300—mid-August 1943	$ 3,300 deposited Aug. 11, 1943
5,000—late August 1943	5,000 deposited Aug. 31, 1943
30,000—December 1943 or January 1944	30,000 deposited Jan. 4, 1944

Gersh only corroborated petitioner on the fact of large cash transmissions, and on that fact he was compelled by his own bank records. Admitting the receipt of cash was contrary to his own interest, and led him to try to show that such large cash transfers resulted in no income to him. Essentially therefore he was hostile to petitioner. His explanation was that he had received moneys from petitioner in order to obtain phonographs and coin machines which he testified were so scarce that they required full cash payment in advance. In rejoinder, petitioner

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[11] He also testified as to two personal deliveries of cash to Gersh of $30,000 and of $3,000, and of a number of mailings of smaller sums, (p. 11 above).

[12] See footnote 7 above.

offered documentary evidence, trade magazines to prove that coin machines were freely offered and easily purchased without the need for advance cash, and correspondence to refute Gersh's assertion that he had arranged phonograph purchases for petitioner. These offers were opposed by Government counsel. The rulings of exclusion were reversed in *Wolcher* v. *United States*, 200 F.2d 493 (see Appendix B, pp. 7a, 15a):

> "We think this evidence was material. It would have had weight in determining the question whether Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher. It should have been admitted."

A. Prosecution's Misconduct

3. At the opening of the second trial the prosecution knew that if the jury were presented with the real issue,—*why* was the cash sent to Gersh—the complete evidence would now include the documentary evidence discrediting Gersh's explanation which had been excluded at the first trial.

And so at the second trial the Government obtained its conviction by presenting the case to the jury not on the real issue but on a spurious one, *whether* cash was sent to Gersh.

As summarized by the judge in the charge (R. 483):

> "The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention."[13]

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[13] Prosecuting attorney's exact words to the jury were as follows (p. 25 of reporter's certified transcript on file with the Clerk):

"And then we come to these fantastic shipments of money to the east. We have only Mr. Wolcher's unsupported word for any amounts of cash that were shipped east. And examining those, I think we ought to look at what a business man would do with

The tactic was telling. The jury apparently found it hard to believe that anyone would send large sums through the mail and by express without receipts. It is certainly not common experience. And of course the jury was unaware that petitioner had in fact been corroborated at the first trial by Government witness Gersh and by his bank records.

There is no difference in effect between a conviction obtained by spuriously challenging testimony as fabricated and a conviction obtained on the basis of fabricated testimony. Due process of law is denied when a conviction is obtained upon the basis of perjured testimony. The doctrine was first announced by this Court in *Mooney* v. *Holohan*, 294 U.S. 103, where the prosecutor knew the testimony was perjured. And it applies even though the prosecutor at the trial did not know the evidence was perjured but the fact is later brought to the attention of the Government. *Jones* v. *Kentucky*, 97 F.2d 335 (C.A. 6 Cir.); *Kelly* v. *Ragen*, 129 F. 2d 811, 814 (C.A. 7 Cir.).

But this case does not require a determination as to due process; there has been a complete failure to meet the standard of fair play applicable to federal prosecutors. *Berger* v. *United States*, 295 U.S. 78. In that case this Court denounced as prejudicial and reversible misconduct a prosecutor's action in presenting the case to the jury upon assumptions which he believed to be *true* but which were outside the record. It is far more serious to traduce as a fabrication testimony of the accused which the Government's files and a previou trial record show have been corroborated by documents of the highest integrity, identified by the Government's witness and vouched for by the Government itself at the earlier trial.

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amounts of cash of that sort. If there were any such amounts of cash sent, would they be sent in this fantastic fashion? $30,000, as I recall, bundled up in an express parcel and insured for a nominal amount. Case after case of a thousand, $1,500 stuffed into an envelope and sent by ordinary mail. I don't think that's a very persuasive story."

Even in a civil case "the fact must be very plain to ever justify a lawyer in declaring his opponent's case to be trumped up." *F. W. Woolworth Co.* v. *Wilson*, 74 F.2d 439, 442-3 (C.A. 5 Cir.).

The presentation to the jury in this case was prejudicial misconduct. See *Berger* v. *United States*, pointing out that improper assumptions by the prosecuting attorney carry disproportionate weight against the accused precisely because the jury has special confidence in the prosecuting attorney as an officer of the law pledged to vindication of the innocent as well as punishment of the guilty. See 295 U.S. 78, at 84.

While the prosecuting attorney "may strike hard blows, he is not at liberty to strike foul ones." *Berger* v. *United States*, 295 U.S. 78, 88. Here he "overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense" (295 U.S. at 84). The Government's proper interest "in a criminal prosecution is not that it shall win a case but that justice shall be done." (295 U.S. at 88.)

Petitioner must now turn to this Court to assure that justice shall be done. The presentation to the jury was not separately assigned as error below. Yet with misconduct so gross, this Court should not hesitate to exercise its undoubted corrective jurisdiction, particularly since the injustice of the summation is part and parcel of the injustice wrought by the prosecution's trial tactics and the Court's ruling which forestalled the corroboration of petitioner by the bank records (see paragraphs 4-9).

4. The presentation to the jury was the capstone of earlier machinations meriting rebuke and reversal, tactics discussed in paragraphs 4-6.

(a) When defense counsel sought to identify the Gersh bank account record by questions to Treasury Agent Appling, the prosecuting attorney maneuvered to curtail defense questioning of Appling on the grounds that there was

no materiality in the bank account of a "stranger" to the trial (R. 464-6).

The prosecuting attorney knew better than anyone else just how material these bank records were. For he knew of his plan to attack defendant's apparently unsupported testimony as a fabrication. See Wharton's Criminal Procedure (10th ed.) sec. 1792, p. 2244:

> "Technical objections to competent evidence by prosecuting attorneys, is a 'trick' which has received merited rebuke at the hands of the courts; and compels reversal of judgment by the higher court.

(b) When Mr. Schnacke, the prosecuting attorney, was requested to identify the Gersh bank account records previously brought into the case by the Government, he said he would be "happy" to take the stand, indeed he would be "tickled" to do so, but he continued (R. 467):

> Mr. Schnacke: I don't have any knowledge of those [bank records]. I wasn't here at the first trial. I don't know anything about it, about any part of it.
>
> Mr. Friedman: Well, all right, if you don't know anything about it, I won't call you.

The prosecuting attorney made a statement as counsel which blocked this effort of defense to identify the records. Even in the abstract, how is it possible to credit Mr. Schnacke's assertion that he had prepared a major criminal case for retrial without studying the record of the first trial. How is it possible to take seriously the suggestion that he decided to release the subpena governing Gersh, the Government's critical witness at the first trial, without having carefully studied Gersh's testimony and exhibits at the first trial.

But the point is clinched by the record in this case. For Mr. Schnacke's conduct of the trial clearly reflected his careful study of the earlier record. This is shown by various

instances set forth in the footnote.[14] Attention is particularly called to the way in which Mr. Schnacke cross-examined petitioner on the details of petitioner's endorsement of a $30,000 check to Gersh. Thus Mr. Schnacke asked such questions as these (R. 397-8):

> "Q. Well, actually, you were in the Corn Exchange Bank, weren't you?
>
> * * * * *
>
> "Q. And to accommodate you in cashing the check he signed the name 'Bill Gersh, The Cash Box', under it, didn't he?
>
> * * * * *

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[14] a. On the first day of the second trial defense counsel objected to the introduction of a photostat of the petitioner's tax return. He quoted (R. 39) from the Government's offer of the original tax return at the earlier trial, with permission to substitute a photostatic copy, as indicating that the Government had custody of the original. Mr. Schnacke called upon defense counsel to "show us in the record anywhere where that photostatic copy was introduced in substitute for the original return" (R. 40).

b. Mr. Schnacke read into the record (R. 268) as part of the Government's case the testimony of John Kirby at the first trial, Kirby having since died. He read one part of Kirby's earlier testimony (Record No. 12992, pp. 368-374), but eliminated another part (Record No. 12992, pp. 656-668) containing the questions which had been held objectionable on the first appeal. (Appendix B, infra.)

c. On cross-examination of Jack V. Kent, Mr. Schnacke indicated by his question (R. 343-4) that he knew that Old Brook whisky did not sell well in the Gold Coast cafe. That fact was later confirmed by petitioner Wolcher (R. 413-4), but at the time Mr. Schnacke asked the question his knowledge of the fact obviously came from the earlier record. (Record No. 12992, p. 435.)

d. On cross-examination of petitioner Wolcher, in addition to the matter stated in the text of this petition for certiorari, Mr. Schnacke asked (R. 406) (a) whether Wolcher had not run an advertisement in the Cash Box every week during the latter part of 1943; (b) whether Gersh had not paid for equipment received by Wolcher from Runyan Sales Co. These questions had no foundation in the second trial. They were the subject of testimony in the earlier trial. See Record No. 12992, as to (a) p. 760; as to (c) at pp. 533, 594-5.

"Q. Well, you were with him at the time, weren't you?

* * * * *

"Q. And didn't the proceeds received on this check go to you in cash?"

None of these details were indicated at the second trial. *They were all as set forth in the testimony of Gersh at the first trial,*[15]*—on the very page that Gersh's (Cash Box) bank account in the Corn Exchange Bank was identified and brought into the case as an exhibit (Exhibit 37) by the Government (Record No. 12992, p. 562).* The earlier record is before the Court; for convenience the cited references are set forth in Appendix C to the petition.

(c) Appling was the special agent in charge of the Wolcher investigation, lasting many months. He testified that he had no occasion to procure a copy of Gersh's "Cash Box" bank account during his investigation, that he could not identify Government Exhibit 37 at the earlier trial as anything he had seen either before or during the first trial. He was asked whether a photostat thereof was procured by his office in the course of the investigation under his charge. Upon the prosecutor's objection the question was excluded. (R. 464-466)

The right-hand man of the prosecution, Appling attended both trials and was obviously familiar with the entire documentary record. Again the transcript of the first trial clinches the point. Government's Exhibit 39 at the first trial was a statement given by Gersh to the Intelligence Unit on March 16, 1949, under questioning by Appling. And Appling asked Gersh as to the correctness of his answers in his previous statement to the Treasury agent concerning the cash receipts from petitioner and expenditures (R. No. 12992, p. 613, Appendix C, p. 40a).

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[15] Record No. 12992, pp. 560-562; Appendix C, infra, pp. 20a-22a. Wolcher gave contrary testimony, denying receipt of proceeds of the check (Record No. 12992, p. 473).

In the previous (1944) statement (Govt. Exh. 40 at the first trial) the Treasury agent had specifically questioned Gersh on the basis of his deposits as shown by the "Cash Box" account at the Corn Exchange Bank and had been advised that these represented cash funds received by Gersh from Wolcher in cash through the mails. (R. No. 12992, p. 629ff, Appendix C, p. 41aff.)

These tactics require reprimand and reversal. At the very least they reveal a lack of minimum candor required of the Government officials in charge of a prosecution. They are doubly meretricious since they not only resulted in excluding the evidence corroborating petitioner's testimony of cash payments to Gersh, but paved the way for the prosecuting attorney to argue to the jury that this testimony was a fabrication.

5. The transparent and clumsy statements of the prosecuting attorney and the revenue agent serve to point up two things: first, the overreaching in this case; second, the necessity for a clear statement by this Court of the Government's affirmative responsibility to acknowledge the existence of evidence in its files corroborating the taxpayer and to make that evidence available to the court.

In this case the prosecuting attorney professed ignorance of the actions of predecessors and the internal revenue agent in charge of an investigation was shielded from questions concerning the evidence developed during the investigation.

The Government necessarily acts through many agents and officers. But there is only one Government. The top officials at the trial—the attorney in charge, and the revenue agent in charge of the investigation—are chargeable with knowledge of the disclosures made to the Government. Otherwise injustice can be ensured by laziness or wilful blindness of the responsible Government officials. See *United States* v. *Ragen*, 86 F. Supp. 382 (N.D. Ill., 1949), where vital documentary evidence favorable to the accused was given to the police but ignored. The court stated "It

is manifest in this matter that some one identified with the prosecution . . . ignored a material piece of evidence", and held "the prosecution is charged with knowledge of what was contained in the certificate." (86 F. Supp. at p. 387.)

6. The prosecution's tactics in regard to Gersh as a witness were a denial of fair dealing which amounted to a suppression of evidence. In some cases suppression is achieved by more sophisticated tactics than others, but the effect is the same. In the clearest case, the prosecution spirits the witness away to a locked hotel room. It is also suppression if the prosecution knows of some real evidence but fails to make disclosure to the defense. *Griffin* v. *United States*, 183 F. 2d 990 (C.A.D.C.) And even in a case where the identity of the witness is clearly known to the defendant, who dealt with him in the transaction involved, it has been held suppression for the prosecution to fail to advise defendant of the witness' statement corroborating defendant in a material respect. *United States* v. *Rutkin*, 212 F. 2d. 641 (C.A. 3d Cir.)

The doctrine of suppression is more accurately a doctrine of appropriate dislosure and notice. When the prosecution has effective control over witnesses and evidence whose production would normally be anticipated, the course of fair dealing is for the prosecution to notify the defense before releasing or removing the witness. *Sullivan* v. *United States*, 32 F. 2d 992, 994 (C.A. 9 Cir.); *United States* v. *Peterson*, 24 F. Supp. 470 (E.D. Pa.)

In the *Peterson* case Circuit Judge Maris (sitting as a district judge) affirmed a conviction for a counterfeiting violation. But he considered the problem of the prosecuting attorney's obligations. He rejected the contention that the prosecution was required to call eye-witnesses or co-conspirators. But in doing so he pointed out (p. 471):

> " . . . it is now sufficient if the prosecutor notifies the defendant of his determination not to call a particular witness who was present when the crime was committed."

In its brief below (p. 30) the Government sought to distinguish the *Sullivan* case on the ground that there the question was whether the prosecution had erred in revealing to the jury that the co-conspirators were available to the defense if desired as witnesses. But in upholding that action of the prosecutor, even in the presence of the jury, the court dramatically confirmed that such advice by the prosecution to defense counsel is the accepted course of proceeding. The court referred to this procedure as a "simple detail" which was "quite proper" (p. 994).

The prosecution's actions in regard to Gersh did not reflect fair dealing with defense counsel. They comprise an artful campaign to keep Gersh out of the court room. First the prosecution subpenaed Gersh, foreshadowing his appearance in rebuttal as at the first trial. At adjournment time on Thursday afternoon Mr. Schnacke advised the Court that he had rebuttal witnesses (R. 455), and that he had noticed his subpenas for Monday (R. 457). The Court called a recess from Thursday to Monday when the defense would conclude its case and the Government put on rebuttal. The next day, Friday, Mr. Schnacke advised Gersh of his release from the subpena (R. 468). No notice was given to defendant. Defense counsel later sought opportunity to produce Gersh to identify the bank records. With obvious irritation, if not dismay, at the prospect that Gersh might come into the court room, the prosecuting attorney stated that Gersh "was notified that he was not to appear. Nonetheless he appears to be in town." (R. 469)

The Government's brief below (pp. 31-2) sought to support its actions on the ground that the defense could not complain it was hurt by Gersh's absence since it had vigorously attacked Gersh's testimony as false at the first trial. Petitioner denies Gersh's testimony as to why he received the cash. But petitioner never contested Gersh's testimony that he received the cash which stands on an entirely different plane; this was an admission contrary to Gersh's own interest and confirmed by the documentary bank records.

The Government also argued below (Brief, p. 31) that there was no "suppression" because Gersh's evidence had been given at the first trial and was known to petitioner. Is the Government suggesting that it had less responsibility at the second trial than at the first? On the contrary, the first trial is part of the background which sharpens the purpose and technique of the misconduct at the second trial. Fair dealing required the Government to advise the defendant that it was releasing Gersh from subpena and would not call Gersh in rebuttal, as it had done at the first trial. This is particularly true since petitioner was wronged at the first trial by being prevented from presenting to the jury the full (documentary) evidence relating to Gersh's explanation.

The underlying principle of fair play was indicated, in circumstances not too dissimilar, as long ago as *Anderson* v. *George*, 1 Burrows 352 (97 English Reports 349) (King's Bench 1757). The defendant bought goods and paid plaintiff with the note of one Hopley, which defendant endorsed. Plaintiff extended time for payment. When Hopley defaulted, the dispute arose whether plaintiff or defendant should bear the loss of this note. Plaintiff had the note in court but rested his case after proving the sale of the goods, a fact which was not in dispute. Defendant had failed to serve a notice to produce the note and was thus unable to prove it. Plaintiff obtained judgment for the value of the goods sold, but this was reversed on appeal. The court thought the plaintiff had taken an unfair advantage, contrary to justice and good conscience.

7. The point has been made that defense counsel could have subpenaed Gersh as a witness. In the first place, the critical need to call Gersh arose because the Government officials professed ignorance of the bank records. Defense counsel pointed out at the trial that he had not anticipated that difficulty (R. 471). Petitioner should not be penalized because defense counsel did not anticipate prosecution's pernicious tactics.

Defense counsel was entirely justified in seeking corroboration of the fact that petitioner sent cash to Gersh from the documentary bank records rather than by calling Gersh as a witness. Gersh was indeed the true witness against petitioner. In the spirit of the Sixth Amendment petitioner was entitled to be confronted by Gersh rather than be put under the necessity of calling him as a hostile witness.

In the second place, and as a separate matter, defense counsel anticipated and was led to anticipate that the prosecution would call Gersh as a rebuttal witness, as at the first trial. It was natural to presume that petitioner would be confronted by the real witness against him. And defense counsel was tricked by the prosecution's action subpenaing Gersh, announcing that it would call rebuttal witnesses (as at the first trial), and releasing Gersh from subpena without notice to petitioner.

Finally, it should be noted that the failure of the defense to subpena or call Gersh could not in any way justify either the prosecution's profession of ignorance concerning the bank records, or its presentation to the jury, as described in paragraphs 3-5.

8. The prosecution, by ignoring Gersh, put on a sham case, a parade of witnesses proving the admitted fact that petitioner received over-ceiling payments. The real issue was why, not whether, petitioner sent cash to Gersh. The question is, do you believe petitioner or Gersh. The case should never have been brought unless the prosecution believed Gersh. Yet the Government kept Gersh out of the court room. Why? Because it was aware how the case would stand if Gersh were called to the stand. Once it was confirmed to the jury that the funds had actually reached Gersh, petitioner could point out the difficulties in Gersh's explanation: That Gersh's contradiction of petitioner was based on his own interest in claiming he had returned funds which otherwise represented income in his hands. That it was not plausible that petitioner would

continue to send funds to Gersh to buy machines, time after time, only to have Gersh promptly return the funds each time saying he could not buy the machines.[16] And most important, petitioner would now be able to introduce the documentary evidence impeaching Gersh's account, which had been erroneously excluded at the first trial.

The Government's failure to call Gersh is mild in comparison to later developments. But in itself it was a maneuver to obtain a conviction by unsound inferences from a partial record, a device to induce the jury to convict because it did not credit petitioner's (seemingly uncorroborated) testimony of cash payments to Gersh. Whether or not the prosecution was required to call Gersh, its failure to do so necessitated scrupulously fair dealing in regard to matters where Gersh would have corroborated petitioner. That is part of the setting for testing the other actions complained of—the prosecution's release of Gersh without notice to defense counsel; its answers frustrating defendant's efforts to identify the corroborating bank records, and the presentation to the jury assailing petitioner's (apparently unsupported) testimony as a fabrication.

B. Judge's Refusal to Reopen Case

9. The Court erred in refusing to reopen the case, to permit defense a reasonable opportunity to call Gersh in order to identify Gersh's bank account record.

The time sequence was as follows: The prosecuting attorney released Gersh on a Friday, during a 3-day recess. On Monday after the conclusion of defendant's testimony, defense counsel was frustrated from identifying the bank records by the actions of the Government officials denying knowledge thereof. Defense counsel perforce rested. The Government rested forthwith. And thus at approximately 10:30 a.m. the taking of evidence was concluded. The

[16] See Record No. 12992, R. 559-560, 563-4, 575-6, 586-8, 601-8; Appendix C, pp. 19a-20a, 22a-24a, 28a-29a, 35a-39a.

judge recessed until 1 p.m. to begin argument to the jury. Defense counsel opened the afternoon proceedings by stating that he had just learned during the recess that Gersh was in fact in San Francisco, and asked for an opportunity to produce Gersh through a subpena, to identify the bank record, and that the case be reopened for this purpose. The prosecuting attorney stated that Gersh had come to San Francisco the previous evening but not under Government subpena, that Gersh had been told not to come but nonetheless seems to be in town (R. 464-469).

Although defense counsel pointed out that the document was "of vital interest to the defendant's case" (R. 468), the judge denied the application forthwith. In his remarks he stated that he should not be so abrupt, but that the case was at too late a stage, that defense counsel could have subpenaed Gersh. He later said that the evidence was material and that the defense application would have been granted if timely made, but was not now timely (R. 468-473).

The request of defense counsel was presented only two-and-one-half hours after he was surprised by prosecuting attorney's tactics regarding the bank records. This was the first order of business after the brief recess called when the case was submitted. No prejudice to the Government could ensue. In the circumstances, the failure to grant a request of admitted materiality on the ground of lack of timeliness is a harsh and technical ruling which departs from the standard of substantial justice which must infuse criminal proceedings. The accepted judicial practice is to reopen the case where substantial items of evidence is concerned.

What the cases *say* is that reopening a case is a matter for the sound discretion of the court. What the cases *hold* is that sound discretion is to be exercised by reopening the case where the evidence is material and significant. See 23 Corpus Juris Secundum, p. 463, sec. 1055:

> "Where it appears, on application to reopen a case to permit the introduction of further testimony, that

> the proposed testimony is of substantial importance to accused, the application should be granted."[17]

The liberality of the Federal cases in reopening a trial, at least before argument to the jury has begun, is in contrast to a stricter attitude on adjournments sought before trial has begun. There is good reason for the difference in attitude, since the importance of the evidence is sharpened by the very course of the trial.

The Federal cases clearly reflect the accepted judicial course of permitting reopening. We have not found a case where a trial court was reversed for failure to reopen the case. That only proves the point. Certainly there are legions of instances where defendant makes the application. But the cases never appear in the reports because the accepted course is to grant the application when the evidence involved is substantial; the defendant can not appeal the reopening, since the ruling is favorable to him, and the prosecution can not appeal an acquittal.

The appropriate Federal Digest keynote reveals a steady stream of decisions granting the Government's motion for reopening a case prior to argument to the jury; the reopening is held to be an exercise of sound discretion. The cases relied on by the court of appeals are to that effect. See *Brink* v. *United States*, 60 F. 2d 231, 234 (C.A. 6), cert. denied, 287 U.S. 667, where the court reopened the case and allowed the Government to introduce "highly relevant testimony tending to show the condition in which appellant kept his bank accounts"; *Horowitz* v. *United States*, 12 F. 2d 590 (C.A. 5). The other cases include *Reining* v. *United States*, 167 F. 2d 362 (C.A. 5), cert.

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[17] See e.g. *People* v. *Oxnam*, 170 Cal. 211, 215, 149 Pac. 165: "While the matter of allowing a party to reopen his case is one committed to the discretion of a trial court, if it had been made to appear to the lower court the proposed testimony was of any substantial importance to defendant, we should say that in the exercise of that discretion an opportunity should have been given to introduce it."

denied, 335 U.S. 830; *Haugen* v. *United States*, 153 F. 2d 850 (C.C.A. 9); *Latch* v. *United States*, 73 F.2d 840 (C.C.A. 9); *McGrew* v. *United States*, 281 Fed. 809 (C.C.A. 9); *Kalen* v. *United States*, 196 Fed. 888 (C.C.A. 9); *United States* v. *Noelke*, 1 Fed. 426 (C.C.A. 2d).

If the decisions allow liberality on this matter to the Government, with all its vast resources, how much more important in the interest of justice is it to assure liberality to the defense. Certainly the Government could not claim it had released witnesses who would refute the witness sought by petitioner, or any other prejudice.

Only one case in the Federal Digest approves the denial of a defendant's motion to reopen the trial before argument to the jury. That case points out that no showing was made as to the nature of the evidence sought to be added to what had already been received, or as to the witnesses by whom it was expected to be given. *Alexis* v. *United States*, 129 Fed. 60 (C.C.A. 5). It is plain that the accepted course of proceedings is for the trial judge to reopen the trial, at least before argument to the jury has begun, to permit the introduction of substantial evidence of importance to the accused.

In sustaining the trial judge, the court below noted only that petitioner could have subpenaed Gersh (R. 510; Appendix A, p. 7a). It did not consider the explanation that defense counsel had not anticipated the difficulty in identification of the bank records, and the impact of prosecution's tactics of releasing Gersh without notice to defendant. See paragraph 7, above.

The abrupt ruling of the trial judge was not a sound exercise of discretion. Petitioner's liberty is at stake, and the evidence is critical. Sound discretion required the granting of the application, although of course under reasonable safeguards to avoid undue delay. The trial judge permitted impatience to triumph over substantial justice. Opportunity for a full defense is the essence of a fair trial.

C. Charge to the Jury

10. In upholding the charge, the opinion below is in conflict with the decision of another circuit court of appeals and fails to apply an applicable ruling of this court.

The judge charged the jury as follows (R. 483):

> "So that in my opinion brings the issue of the case down to a very simple, and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believed his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty."

The charge riveted the attention of the jury upon the question of whether or not they believed the defendant, and distracted their attention from the basic duty of the Government to prove its case, and to prove it beyond a reasonable doubt.

Both the language quoted and the charge taken as a whole, impelled the jury to convict solely because they did not affirmatively believe petitioner's account of large cash shipments to Gersh. That is error as a matter of law, but an error of particular importance in this case. It put the finishing touch on the prosecution's mischievous campaign in the minds of the jury, which did not know of the corroborating evidence.

The charge was particularly prejudicial since the judge knew that only the previous day he had denied petitioner an opportunity to present corroborating evidence. Notwithstanding the rigor of that ruling, the instruction focussed on the point of cash transfers and the Government's claim that petitioner's testimony was fabricated. The judge referred to the illegality of the transactions involved and the failure to keep records as factors which the jury could take into account, and "which the Court

considers are important factors to take into account" (R. 484.). Even the charge that a jury might disregard all of a witness' testimony if they consider he testified falsely in any material respect (R. 479), which is generally proper, had the impact in this case of inducing conviction if the testimony of cash shipments was found not plausible.

The opinion is in conflict with *Balman* v. *United States*, 94 F. 2d 197 (C.A. 8th Cir.). In that case the trial judge charged:

> " . . . Proof that the defendant was in possession of property recently stolen raises a presumption of guilty knowledge in the absence of an explanation, and it is for you to determine whether the defendant's explanation given by him in this case is sufficient to overcome the presumption; that is, it is for you to determine whether you believe the defendant's explanation of the trunk containing the furs being in his residence."

The court of appeals held that this charge was in error, in effect imposing upon the defendant the duty to establish his innocence and omitting the instruction that acquittal might follow on the Government's case even without an explanation by defendant.

See also *United States* v. *Phillips*, 217 F. 2d 435 (C.A. 7 Cir.), holding that the burden of proof had been shifted to defendant by the judge's failure to charge that the testimony of prosecution's own witnesses might negative proof of wilfulness beyond a reasonable doubt.

The charge obliterated the point, of which the jury should have been made specifically aware, that the Government's own witnesses on the payment of over-ceiling prices to petitioner also testified as to the existence of conditions which indicated that petitioner may not have had income in view of the over-ceiling prices necessary to obtain the whisky. There was testimony that the established wholesalers could not obtain supplies, that there was

no whisky available in the area except at over-ceiling prices. (Petitioner admittedly resold some of the whisky at retail ceilings, which would mean a loss on any whisky bought above ceiling.)

The court of appeals was obviously troubled by the charge but found that it was saved, taken as a whole. It said that the charge that acquittal should follow from a belief in defendant's "story" implied a reference to the defense as a whole, including the testimony of the prosecution's own witness, rather than the defendant's testimony. If anything the term "story" as used in the charge had the effect not only of focussing attention on petitioner's testimony but of doing so in a derogatory fashion, increasing the real burden on defendant. Petitioner was entitled to a clear instruction indicating the possibility of acquittal based on the testimony of prosecution's own witnesses.

The court of appeals also noted that the charge contained various references to the Government's burden to prove guilt beyond a reasonable doubt. But it is elementary that the general portions of the charge are pale to the jury compared to the review of the specific facts and issues.

In *Bihn* v. *United States*, 328 U.S. 633, this Court held that where the case against the defendant was a close one, manifold repetitions of the general principle of presumption of innocence would not outweigh the fact that on the crucial specific passage of the charge, there was substantial possibility that the jury would conclude that the defendant had the burden of explaining possession of stolen ration coupons.

In this case, the specific parts of the charge had essentially this impact upon the jury: (1) The Government says defendant's account of cash shipments is a fabrication. (2) Defendant contends he made no profit. (3) If you believe his story, return a verdict of not guilty; if you do not believe his story, convict him. The surrounding parts of the charge heighten, if anything, the impression generated in the jury that to acquit they had to believe the defendant's testimony.

Each time the petitioner was convicted only because the Government kept from the jury the full evidence relating to Gersh.

At the first trial, however, the Government was aware of its burden to prove an income tax violation. In the second trial the prosecuting attorney secured a conviction in effect by proving admitted ceiling price violations, and by extreme measures diverting from the jury the real facts and issues as to income tax evasion.

The prosecuting attorney saw fit to introduce as a judicial admission the fact that Wolcher pleaded guilty to a criminal information charging ceiling violations on whisky involved in the present case. The court overruled petitioner's contention that the previous criminal proceeding was cumulative as to the admitted fact of receipts over ceiling, yet prejudicial in the mind of the jury (R. 243).

The prosecuting attorney stated in a surface spirit of fair play, that he would anticipate the judge would instruct the jury to disregard the other criminal proceeding except as proof of the fact of over ceiling receipts. Defense attorney said that that would only emphasize the prejudicial evidence (R. 245). The court charged the jury that defendant had already pleaded guilty to price ceiling violations and was not on trial again for the same offense (R. 483-4). The judge stressed that the illegality of the transactions and failure to keep records were important factors in his view.

Lip service is doubtless paid by the Government to the principle that petitioner's admitted violation of OPA ceilings cannot be used to override his innocence of income tax fraud. The actions of the Government officials speak louder than their words.

CONCLUSION

The Government's concern in enforcing the revenue laws and the stern dispensation of justice to wilful violators can not be doubted. But, the Government has a

greater interest in assuring that it is justice that is dispensed, however sternly. As a great Solicitor General has said, "The United States wins its point whenever justice is done its citizens in the courts."

In this case justice was denied: This was due principally to the prosecution's misconduct. The conditions created by that misconduct both induced and were seriously aggravated by the impatience of the trial judge and his charge slanting the burden of proof.

The resulting prejudice to petitioner can not be doubted. The spontaneous jury recommendation of leniency emphasizes how troubled it was even upon the case as it was permitted to develop.

Our democratic society stands in fundamental danger if the prosecution's interest in securing convictions is placed above justice. It is timely for this Court to give renewed and vigorous expression of the principle of fair dealing toward the accused, and to provide a meaningful application of that principle in the matter of evidence in the Government's possession corroborating a taxpayer accused in criminal proceedings. The petition for a writ of certiorari raises important issues of the administration of justice in criminal proceedings and should be granted.

Respectfully submitted,

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Attorney for Petitioner

Of Counsel:
LEO R. FRIEDMAN

JUL 13 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 253

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No.

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 15, 1956.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is printed in Appendix A, p. 1a. It has not yet been reported.

The opinions of the Court of Appeals in earlier phases are reported in 200 F.2d 493 and 218 F.2d 505.

The order of the District Court appears at R. 26.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1956. Rehearing was denied on June 15, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

QUESTION PRESENTED

In a prosecution for evasion of income taxes based on alleged profits from black market operations, where defense seeks to corroborate defendant's testimony of his payments to a co-conspirator as a part of such operations, is the testimony of a middleman as to the acts and declarations of the co-conspirator made in the course of and for the purpose of carrying out such black market operations admissible as part of the res gestae.

STATUTE INVOLVED

26 U.S.C. sec. 145(b). Internal Revenue Code, sec. 145(b) (as in effect prior to the Internal Revenue Code of 1954) reads:

> "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade any tax imposed by this chapter or the payment thereof, shall, in addition to the other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution."

Rule 33 of the Federal Rules of Criminal Procedure:

> "The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

STATEMENT

This case arises on a motion for new trial on the ground of newly discovered evidence and presents the issue of the legal admissibility thereof. Before setting forth the newly discovered evidence it is appropriate to review the factual background exclusive of the newly discovered evidence.

A. BACKGROUND

Petitioner's conviction for income tax evasion was of course on a record lacking the newly discovered evidence. An earlier conviction was reversed by the Court of Appeals for the Ninth Circuit, *Wolcher* v. *United States*, 200 F.2d 493—Record No. 12992. On a second trial petitioner was convicted and the conviction was affirmed in *Wolcher* v. *United States*, 218 F.2d 505—Record No. 14109. Petitioner was sentenced to two years imprisonment. This Court denied the petition for certiorari—No. 77, October Term, 1955.

Both trial records were before this Court on the petition for certiorari and are before this Court now. The factual background of the conviction is discussed in detail in petition No. 77, 1955 Term, and the salient portions of the first record (No. 12992) are reprinted in the Appendix to said petition. (Appx. C., pp. 18a-44a). All the foregoing is part of the record on this motion for new trial—Record No. 14919, see pp. 4-5, 67.

1. Petitioner's Admitted Black Market Receipts on Sales of Case Whiskey. His Explanation of Equivalent Payments Made to Gersh to Purchase Case Whiskey on the Black Market Negativing Income From Petitioner's Wholesale Activities, and Resulting in Profits to Petitioner at Retail Tavern Level Where All Taxes Were Paid and No Evasion Is Charged.

The Government's proof of income tax evasion consisted of evidence that petitioner collected sums in cash from black market sales of case whiskey. The facts were described in the first opinion, see 200 F.2d 493, at 495:

> "The sales were made through San Francisco liquor wholesalers who would receive checks for the ceiling price of the liquor while the purchaser would pay an additional over ceiling amount in cash which went to Wolcher."

At the second trial the Government introduced testimony similar to that presented at the first trial. The Government also introduced, over objection, petitioner's previous conviction on the charge of ceiling violation (R. 14109, 239-245).

The court below set forth petitioner's defense as follows (200 F.2d at p. 495):

> "Wolcher admitted the overceiling transactions, but contended that although he received those pro-

ceeds he made no profits from these operations for the reason that in purchasing or acquiring the liquor, he himself was obliged to make overceiling payments or bonuses in a large amount, and that the sums so paid wiped out any possible profit. He testified that the amounts so laid out by him were paid to one William Gersh, stating that on some shipments the overceiling bonus paid Gersh amounted to $20 and on others to $25 a case."

Petitioner's own admissions accounted for the bulk of the Government's proof of his black market receipts on sales of case whiskey. These overceiling receipts of petitioner were set forth as follows in the summation to the jury by Assistant United States Attorney Schnacke:[1]

Cases of Whiskey Purchased by Defendant	Black Market Sales No. of Cases	Unreported Profit
A. Shipped from East Coast to:		
Franciscan Distributing Co.		
100 Supreme Bourbon	68	$ 1,472.20
500 Schenley Royal Reserve	335	7,292.95
500 Golden Wedding	450	11,475.00
1,000 Gallagher & Burton	815	21,243.00
George Barton Co.		
~~500 Gallagher & Burton~~	1,432	47,370.56
		$88,853.71
B. Purchased from Rathjen Bros.		
500 Old Brook	300	6,150.00
5,138 Total	3,400	$95,003.71

[1] The data in the Table are from pp. 3-9, Transcript of Mr. Schnacke's opening argument, August 31, 1953.

Transcripts of the summations at the second trial are filed with this Court and are part of the record on this petition (R. 14919, pp. 5; 65-6.)

Petitioner testified that part of the whiskey which he purchased by making overceiling payments was transferred *at the ceiling price* shown on the invoice to what are here referred to as the Wolcher taverns, taverns in which petitioner or members of his family were identified as owners. (R. 14109, p. 365.)

In summary, petitioner's testimony that he did not realize any income on his purchase and sale of case whiskey was based on the fact that the 5138 cases he purchased in the black market exceeded the quantities he sold in the black market. In regard to the case whiskey sold to outside taverns on the black market, he made a profit since his black market sales overages exceeded his black market purchase overages on that whiskey. But he testified that these net black market profits were absorbed by the losses taken on sales to the Wolcher taverns—where petitioner's sales were at ceiling but his purchases were for said ceiling price, as set forth in the invoices, plus black market purchase overages. (R. 14109, p. 366.)

Petitioner did not say that he made no profits as a result of his black market activities. He expressly testified that the profit was not from sale of liquor *by the case*, at wholesale, but was rather realized at the retail (tavern) level in the sale of liquor by the glass. (R. 14109, pp. 409-410).

It is conceded that the Wolcher taverns made substantial profits as a result of petitioner's black market activities. Their purchases of approximately 1,000 cases of whiskey at ceiling rather than black market prices alone meant a savings to them of over $17,500 as a conservative estimate based on black market price paid by petitioner. The saving is even greater if the ceiling price is compared with the $60 price

paid to petitioner by outside retail taverns. But there is no charge or claim, and there could be none, of understatement of income in the returns filed for the Wolcher taverns.

2. Petitioner's Testimony of His Payments to Gersh. (References to Record No. 14109.)

Petitioner testified that for the purposes of acquiring whiskey from the East, he contacted William Gersh, who published a coin machine paper. He first had a talk with Gersh about whiskey in the spring of 1943.[2] As a result in June 1943 he sent Gersh a bank draft in the amount of $5,000 to apply on the overage that the whiskey cost over and above its regular invoice price. As a result the first shipment of whiskey arrived from the East through Franciscan Co. (R. 353-9.) In his first arrangement with Gersh he was to pay $20 a case overage above ceiling. This continued for three shipments. Thereafter at Gersh's suggestion the overage was $25 a case. (R. 361-2.)

Petitioner further testified: I sent the money to Gersh in various ways. I would issue a check and buy a bank draft for it; or I would buy a bank draft for cash without having issued a check; or I would send the money to him in cash by mail or express, or if I saw him I would deliver it to him either in cash or by check (R. 359-360.)

I definitely recall sending the following payments to Gersh, all to be applied against the overage of the whiskey (R. 361):

---

[2] Petitioner was asked what conversation he had with Gersh. The Government objected and the objection was sustained. (R. 355-6).

$ 5,000 in June 1943 (R. 358). I drew a check upon my bank account (Deft. Exh. E, R. 370) and purchased a bank draft which I sent to him. (R. 363).

$ 3,300 cash by mail in the middle of August 1943 (R. 359).

$ 5,000 at the end of August 1943, in cash by mail (R. 461).

$12,500 by cashier's check payable to Gersh dated September 29, 1943, (Deft. Exh. I), which I purchased for cash (R. 378-9).

$60,000. Of this amount $30,000 was in cash and $30,000 was in a bank draft, which I delivered to him in New York in November 1943 (R. 360-361); Deft. Exh. F. R. 371-2).

$30,000 cash by express in December or January 1944 (R. 362).

A number of mailings to Gersh of $1,000; $1,200; $1,500 apiece (R. 404).

$ 3,000 cash to Gersh in New York in 1944 for the purpose of winding up our transactions (R. 367-8).

Petitioner further testified: During this period I received money back from Gersh in accordance with our understanding for the two instances when I transferred money by check in a way that appeared on my books. I entered the original $5,000 on my books as a suspense item, Bill Gersh. When he returned the $5,000 by check dated August 13, 1943 (Deft. Exh. G, R. 374), we put it in the bank account and cancelled the entry (R. 364).

In November 1943 I didn't have enough overceiling money to send the required cash and I borrowed $30,000 to buy a bank draft payable to me which I endorsed over to Gersh. That was the same, for all practical purposes, as a check on my bank account. He was to return that money to balance off my books (R. 380).

He sent me a check for $22,750, dated February 1, 1944 (Deft. Exh. H, R. 375) and a check for $2,000 drawn by his wife (R. 379; Deft. Exh. J. R. 383). Gersh's accountant suggested that I let Gersh pay for some equipment, to account in some measure for his handling that money. I arranged for Gersh to make a payment of $5,250 to Runyon Sales Co. for some phonographs I had purchased. (R. 376-7.)

The $12,500 cashier's check which I bought for cash did not appear on my books, and Gersh never returned that money. Nor did he return any of the cash money I sent him. (R.379.)

Petitioner testified that he kept no books as such on these transactions, and kept only a brief memorandum record at that time of amounts owing, which he later disposed of so as to avoid unnecessary records involving a black market commodity (R. 382, 437-439).

The instances that involved a written record, because checks were used, were covered up so as to avoid showing a whiskey transaction (R. 403-5).

Petitioner admitted he had no record of the money he sent to Gersh by mail or by express (R. 403-4).

3. The Evidence at the First Trial: (a) Corroboration in Gersh's Bank Records of Substantial Amounts From Petitioner by Check or in Cash by Mail or Express. (b) Gersh's Conflict With Petitioner as to the Purpose of the Payments and as to Petitioner's Personal Delivery of Cash.

At the first trial, Gersh was called as a rebuttal witness by the Government. His documentary bank records established and he admitted receipt of substantial amounts which petitioner testified had been sent to Gersh by check or in cash by mail or express. But

Gersh in his testimony contradicted petitioner as to the purpose for which money had been sent, and he denied petitioner's testimony of his personal delivery of cash to Gersh.

Gersh's testimony as to the alleged "coin machine" purpose of petitioner's payments is briefly stated in *Wolcher* v. *United States,* 200 F.2d 493, at page 495:

> "Gersh was called as a rebuttal witness for the Government and while he stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher. His testimony was that at that time coin machines were very difficult to procure, and that they could be bought only by cash payment in advance of the full purchase price. This, he said, was why Wolcher sent him these sums of money. He testified that he bought ten phonographs for Wolcher during this period, the purchase amounting to $5,250, but that he had returned all the balance of the $85,000 to Wolcher."

In rejoinder, petitioner offered documentary evidence, trade magazines to prove that coin machines were freely offered and easily purchased without the need for advance cash, and correspondence to refute Gersh's assertion that he had arranged phonograph purchases for petitioner. These offers were opposed by Government counsel. The rulings of exclusion were reversed in *Wolcher* v. *United States,* 200 F.2d 493, at p. 499.

The following table shows the extent to which receipts from petitioner were corroborated by Gersh's bank records, and Gersh's denial of petitioner's personal delivery of cash.

Wolcher Testimony of Payments to Gersh (References to Record No. 14109)	Gersh Corroboration (References to Record No. 12992; relevant portions reprinted in Appendix C, Petition for Certiorari, No. 77, October Term, 1955)
$ 5,000 by check in June 1943 (R. 358, 363)	R. 12992, pp. 559, 585 Appx. C, pp. 20a, 27a
3,300 cash by mail, Aug. 1943 (R. 359)	R. 12992, p. 586 Appx. C, p. 28a
5,000 cash by mail, Aug. 1943 (R. 461)	R. 12992, p. 587 Appx. C, pp. 28a, 29a
12,500 cashier's check payable to Gersh, bought for cash, Sept. 1943 (R. 378-9)	R. 12992, p. 587-8 Appx. C, p. 29a
60,000 personally delivered Nov. 1943: $30,000 by draft; $30,000 in cash (R. 360-1, 371-2)	Gersh claimed he handled the $30,000 bank draft only to cash same for Wolcher. He denied receipt of the $30,000 cash which petitioner testified he personally delivered to Gersh. R. 12992, pp. 560-563, 588-592; Appx. C, pp. 20a-22a, 29a-32a
30,000 cash by express, Jan. 1944 (R. 362)	R. 12992, p. 592-3, Appx. C, pp. 32a-33a

4. Conviction at Second Trial Due to Lack of Evidence Corroborating Petitioner's Unsupported Testimony.

At the second trial, Gersh's bank account records—corroborating petitioner's cash mailings of $3,300, of $5,000, and of $30,000—were not in evidence.

Defense counsel was stopped from asking questions of Richard Appling, special revenue agent in charge, to lay a foundation for introducing in evidence the Gersh bank account records produced at the first trial. Mr. Schnacke objected that the bank account of some "stranger" to the trial was not material, and the line of questioning was stopped. (R. 14109, pp. 465-6.)

The prosecution released Gersh from subpena and did not call Gersh in rebuttal as at the first trial. The

record was closed. A few hours later, promptly on learning that Gersh was in San Francisco, and prior to submission to the jury, defense counsel sought leave to call Gersh, to identify the bank records. The request was opposed by the prosecution and denied by the trial judge. (R. 468-473.)

These rulings and actions are not challenged at the present time as reversible error. But they explain why, in considering the significance of the newly discovered evidence in relation to the totality of evidence which will be available at a new trial, it is necessary to consider the record in No. 12992, as well as the record in No. 14109 and the newly discovered evidence.

The fact that the defense rested solely on petitioner's unsupported testimony, and that there was no corroboration thereof, was stressed in the summation of Mr. Schnacke, the prosecuting attorney:

> "And then we come to these fantastic shipments of money to the east. We have only Mr. Wolcher's unsupported word for any amounts of cash that were shipped east. And examining those, I think we ought to look at what a businessman would do with amounts of cash of that sort. If there were any such amounts of cash sent, would they be sent in this fantastic fashion? $30,000, as I recall, bundled up in an express parcel and insured for a nominal amount. Case after case of a thousand, $1,500, stuffed into an envelope and sent by ordinary mail. I don't think that's a very persuasive story." (R. 14919, p. 7.)

In regard to petitioner's evidence, available from check records, showing a payment to Gersh of $47,500, with $35,000 eventually returned, the prosecutor stated:

> "But who was Mr. Girsh (sic)? Mr. Girsh was a man in the business of operating a magazine in

> the coin-operated machine field. Mr. Wolcher had, he says, tremendous amounts of correspondence with him—or large amounts of correspondence. Never a word in any of that about any liquor transactions. Mr. Wolcher told you that the only business outside of the magazine that he knew about Mr. Girsh possibly being in was that he might have had a farm at sometime or another. No word on his books about any of these checks concerning liquor. Mr. Wolcher told you that Mr. Girsh had handled or had paid for equipment that he had purchased for him. Mr. Girsh I don't think is a significant factor. The significant factor is Mr. Wolcher." (R. 14919, p. 8.)

The trial judge summed up the issue in his charge (R. 14109, p. 483:

> "The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention."
>
> * * *
>
> "So that in my opinion brings the issue of the case down to a very simple, and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case."

On this record, with the defense resting solely on petitioner's unsupported word both as to the purpose of his payments to Gersh and as to the making of any cash payments to Gersh, the jury convicted but with a recommendation of leniency. (R. 14109, p. 6.) Judg-

ment was for two years' imprisonment and $10,000 fine (R. 19).

5. Corriston's Newly Discovered Testimony Corroborating Petitioner.

The motion for new trial on the ground of newly discovered evidence presented the testimony of Edwin Corriston, by affidavit (R. 14919, pp. 13-17), and tender to testify, summarized as follows:

Corriston is in the business of operating amusement machines and has long known Gersh. In the spring of 1943 he met Gersh on Tenth Avenue in New York, where most of the coin-operated machine business is carried on. Gersh told Corriston that Wolcher, a mutual friend, had become interested in taverns on the West Coast; that he, Gersh, was looking for a contact in the liquor business so that he could obtain black market liquor for Wolcher; that he had received cash from Wolcher for that purpose. Apparently to convince Corriston that he was seriously interested Gersh pulled out an envelope and showed a wad of hundred dollar bills. Corriston suggested a whiskey contact at that time.

Several months later Gersh told Corriston at lunch that the previous contact had petered out, that Wolcher needed more whiskey and did Corriston have any further ideas on where he, Gersh, could get it.

Corriston relates that a few days later he advised Gersh that he, Gersh, would be contacted by a man named Garry Taylor or his associate Carlin; that Taylor called Corriston and said the transaction would require about $50,000 in cash and that he and Carlin wanted to be sure that Gersh was good for so much

money; that Corriston told Gersh what Taylor had said, that Gersh said that was no problem as he had already received plenty of cash from Wolcher, and that Corriston passed that information on to Taylor.

Corriston further relates that, as a result of these calls, Corriston arranged a meeting between Taylor, Gersh and himself in New York and that he told Gersh that Taylor wanted Gersh to bring $10,000 with him to the meeting to show good faith and make the deal. The meeting was held; there was a conversation pertaining to the monies involved; Taylor said there was approximately $50,000 involved in cash payments for the whiskey; Gersh said he had all the money in hand and was prepared to pay for the shipments when ready. Taylor said he wanted $10,000 now; at that meeting Gersh paid Taylor the $10,000 deposit. Later Gersh called Corriston to thank him again, for the Taylor whiskey contact.

Corriston further deposed that he did not reveal his knowledge of the transactions to petitioner until after the second trial because of his reluctance to get involved in a criminal case.

6. Opinions of Courts Below, and of Justice Douglas Granting Bail Pending Determination of Evidence Question.

The District Judge denied the motion for new trial stating that there was no legal basis for granting a new trial (R. 26).

In his opinion of December 31, 1955, granting bail (Appendix B, infra, p. 8a) Mr. Justice Douglas stated that the issue of the admissibility of Corriston's evidence raised a substantial question. "If the evidence is admissible, it might well tip the scales in defendant's

favor, as it goes to the heart of the case. I express no opinion on the merits, but I consider the question of sufficient substance to grant this application for bail." (Id. at p. 9a.)

The opinion of the Court of Appeals is in Appendix A, infra, p. 1a. The court affirmed, holding that Corriston's evidence was not legally admissible.

REASONS FOR GRANTING THE WRIT

I.

In holding that rejection of the evidence proferred by petitioner was required by basic principles of the law of evidence, the court below rendered a decision in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Aetna Ins. Co.* v. *Licking Valley Milling Co.* 19 F.2d 177 (1927).

The conflict arises from the difference in the views of the two courts as to principles set forth in *St. Clair* v. *United States* 154 U.S. 134 (1894), concerning the admissibility as part of the res gestae of acts and contemporaneous declarations accompanying or causally related to acts in issue. The court below limits the *St. Clair* case as permitting admissibility only against a co-conspirator. The court below held that the rule excluding hearsay means that such declarations cannot be received as part of the res gestae in behalf of a co-conspirator or principal. The contrary was held by the Court of Appeals for the Sixth Circuit, which applies the res gestae principles as they were set forth by this Court in the *St. Clair* case, and without such limitation.

Petitioner submits that the court below refused to apply the principles as to the scope of the res gestae

doctrine set forth by this Court in *St. Clair* v. *United States* supra, and properly applied by the Sixth Circuit in the *Aetna* case, and that the court below improperly distinguished and limited the *St. Clair* decision.

The decision below has the effect, not only for this case but for future criminal proceedings, at least in the Ninth Circuit, of shutting the eyes of judges and juries to evidence that is essential to a just verdict. The question is one of general importance warranting review by this Court.

1. The prosecution's proof of income tax evasion consisted of proof of petitioner's activities in the whiskey black market. The prosecution even introduced proof of petitioner's black market conviction over objection that this was cumulative for the prosecution yet prejudicial to petitioner (R. 14109, p. 243).

The defense is that when petitioner's whiskey black market activities are taken as a whole, they negate income tax evasion. Petitioner admitted sales of case whiskey in the black market; indeed he admitted black market sales of a far greater amount than the Government proved directly. But petitioner established, and it is not controverted, that petitioner purchased approximately 5,000 cases of whiskey, and that he sold approximately 1,000 cases to the Wolcher taverns at ceiling. It is petitioners defense that all 5,000 cases purchased by him required black market overages, and that these overages equal his black market receipts on the lesser amounts sold by him in the black market.

The whiskey purchased by petitioner which was not resold in the black market was sold at ceiling. The

Wolcher taverns saved over $17,500 by purchasing from petitioner at ceiling prices instead of paying black market prices. But there is no contention, and there could be none, of understatement of income in returns filed for these taverns.

Petitioner's wholesale whiskey activities in the black market did not yield taxable income because the profits on sales above ceiling to outsiders were absorbed and offset by the losses on sales at ceiling to the Wolcher taverns. Such profits as petitioner made from the retail activities of the Wolcher taverns does not involve any claim of tax evasion since there is no claim or evidence of understatement of income for the Wolcher taverns.

The key element in petitioner's defense was his testimony that in his whiskey black market activities he was in league with a William Gersh to whom he transferred the overages for purposes of acquiring case whisky in the black market. These moneys were transferred in part by check, in part by mailing cash, in part by personal delivery of cash.

Petitioner's testimony was challenged by the Government as a fantastic fabrication, a defense resting wholly on his unsupported word.

Petitioner could not corroborate his testimony by calling Gersh for Gersh was a hostile witness. At the first trial Gersh's bank records established, and Gersh accordingly admitted, receipt of large cash sums received from petitioner through the mails. But Gersh claimed that the money was sent to him by petitioner to make cash payments in advance for coin machines.

2. As a matter of common sense and simple justice it seems plain that Wolcher should be able to corro-

borate his testimony of his black market conspiracy with Gersh by calling the middleman, who provided the access to the sources of the black market whiskey, to testify as to Gersh's acts and declarations to him in the course of Gersh's black market activities, as proof that Gersh, depicted by the Government as a mere coin magazine publisher who was not a significant factor (see *supra*, pp. 12-13), was in fact fully engaged in such whiskey black market activities.

The court below held that the only basis for admitting the declarations of a co-conspirator is that they are vicarious admissions, and that therefore they are admissible only against—and not in favor of—a co-conspirator. The doctrine of vicarious admissions is one basis but it is not the only basis for admitting the declarations of a co-conspirator.

The more fundamental basis of admissibility is this—that where persons are associated together in a criminal plan their various acts in the course of execution of the criminal plan and their declarations accompanying such acts or causally related as preparations for such acts, are admissible as the res gestae in the interest of justice, so that the jury may have a complete view of the intertwined acts and declarations. *American Fur Co.* v. *United States*, 2 Pet. 358, 365 (1829).

In *St. Clair* v. *United States*, 154 U.S. 134, 149 (1894), Justice Harlan said:

> "St. Clair, Sparf, and Hansen were charged jointly with having killed and murdered Fitzgerald. The acts, appearances, and declarations of either, if part of the res gestae, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time

the alleged murder was committed. Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence.

* * *

" 'The res gestae, 'Wharton said, 'may be, therefor, defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.' 1 Wharton, Ev. § 259."

The court below refused to recognize that the very fact that Gersh's declarations were made, interwoven with his other acts, was important evidence irrespective of the truth of what he declared.

The court below further held that *St. Clair* does not permit the use of declarations to show the truth of what

is declared unless the acts and declarations of a co-conspirator or agent are offered in evidence *against* a co-conspirator or principal.

The ruling below is in conflict with the rule followed by the Court of Appeals for the Sixth Circuit. In *Aetna Ins. Co.* v. *Licking Valley Milling Co.*, 19 F.2d 177 (1927), the declaration of the agent to his principal was admitted in favor of the principal for testimonial use, to prove the truth of what the agent said at the time. The issue in *Aetna* was whether an insurance policy had become effective. Plaintiff agreed to place insurance on its mill with one Bennett, an insurance agent, who did not have an agency for the Aetna company. Plaintiff's manager testified that in his presence Bennett, who represented plaintiff, telephoned someone, identified to him by Bennett as Aetna's agent Stone, and that "after the conversation over the 'phone, he [Bennett] told me the insurance was in effect." 19 F.2d at 178. The court held that Bennett's statement, made at the close of this conversation, was admissible as part of the res gestae in favor of his principal—to show that the insurance had been placed in effect.[3]

The court cited its earlier opinion in *Tuckerman* v. *United States*, 291 Fed. 958 (6th Cir. 1923), cert. denied, 263 U.S. 716, a prosecution for bribery. There the declaration of an official to his wife, that defendant had given him money, was held admissible. That dec-

[3] The rule, as stated in 32 C.J.S. Evidence, Sec. 410, p. 28, is that declarations of an agent made at the time of a particular occurrence or transaction, or near enough thereto to form a part thereof, which tend to explain or illustrate it, made whilst the agent is acting within the scope of his authority, may be given in evidence as part of the res gestae, "either for or against the principal or employer."

laration, the court said, was a "contemporaneous statement directly relevant to the primary fact of [defendant's] payment of money, a fact not only natural, but important to be stated to [the wife], who was to give clearances." 291 Fed. at 970.

In *Aetna* the court held, citing *Tuckerman*, that Bennett's declaration was admissible even though declarant was not a party to the case, and even though there were no circumstances of shock, stress, or excitement which would qualify the declaration as a "spontaneous exclamation." The Aetna decision pointed out that the declaration was admissible as part of the res gestae so long as the statement when made was, in the words of Wharton:

> "* * * in immediate causal relation to the act—a relation not broken by the interposition of a voluntary individual wariness seeking to manufacture evidence for itself; St. Clair v. United States, 154 U.S. 134, 149, 14 S. Ct. 1002, 38 L. Ed. 936, where the court cites with approval the definition of res gestae found in Wharton on Evidence (2d Ed.) § 259, 1879." 19 F.2d at 180.

Corriston's testimony should have been admitted under the res gestae rule, as set forth in *St. Clair* and *Aetna*, without being excluded because it involved hearsay to some extent. Moreover, it should clearly have been admitted as proof of the fact, which the Government denied, that Gersh was engaged in whiskey black market[4] activities, and in contravention of the prosecu-

[4] The prosecution argued to the jury that Gersh was shown to be in the coin machine business and not the whiskey business, that indeed petitioner testified that Gersh had handled such coin equipment for petitioner, and that there was nothing apart from petitioner's uncorroborated testimony to show that Gersh was involved in whiskey black market activities. See pp. 12-13, above.

tor's claim that Gersh was merely a coin magazine publisher who was not a significant factor in the whiskey black market activities:

a. Corriston testifies that Gersh solicited him on two different occasions to obtain black market whiskey. He is testifying as to Gersh's words, to be sure, for solicitations are words. Gersh's words are not used testimonially to prove the truth of the words uttered but rather to prove that Gersh actually uttered these words of solicitation.

b. As the middleman between Gersh and Taylor, the source of the supply of case whiskey, Corriston testifies that in the negotiation to set up a further meeting he advised Gersh that it was necessary to assure Taylor that Gersh was good for $50,000 in cash, with a $10,000 advance deposit; that at the resulting meeting Gersh gave assurances to Taylor of $50,000 cash on hand, paid Taylor a $10,000 deposit, and entered into an agreement to pay Taylor the additional $40,000. (R. 16.)

Without any hearsay use whatever, the mere fact that Gersh made these statements, which are "verbal acts" of solicitations, negotiations, assurances, and agreements relating to the purchase of black market whiskey, is proof of Gersh's black market activities that is unquestionably material.

c. Moreover the court below concedes that statements of present intent are admissible in evidence. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892). Accordingly Gersh's statements were admissible to show his intention to obtain substantial volumes of black market whiskey and his intention to pay $40,000 cash in addition to the $10,000 deposit.

Most of Corriston's testimony is accordingly admissible under the foregoing rules. His testimony that Gersh stated that he was acquiring the whiskey for petitioner is also admissible for the reasons set forth in Wharton, and the *St. Clair*, *Aetna* and *Tuckerman* cases.

Gersh's statements both (1) are illustrative of the character of his black market purchases,—as made in petitioner's behalf and not for his own account, and (2) are integrally and causally related to the black market purchases, since they were made first as part of Gersh's efforts to induce Corriston to act as middleman, and second, to assure Corriston that he, Gersh, had the necessary cash to consummate the purchases since he had obtained the cash from petitioner.

The *St. Clair* rule applies to interrelated acts and declarations of persons while engaged in execution of the criminal plan, and holds them admissible as part of the res gestae. The statements thus admissible as res gestae are limited to declarations made at the time of or in causal relation to the execution of the criminal plan. Otherwise the declarations may represent "the interposition of voluntary individual wariness seeking to manufacture evidence for itself." *St. Clair* v. *United States*, supra, 154 U.S. at 149.

Gersh's statements to Corriston in the course of his black market activities are equally if not more reliable than Gersh's present testimony. These statements to a middleman who was himself part of the conspiracy are not subject to attack as in anyway self-serving or exculpatory when made. By their very nature they did not reflect an "individual wariness seeking to manufacture evidence for itself." Where statements of a co-

conspirator are naked declarations not causally related to the actual execution of the plan, there is reason to limit admissibility only to statements qualifying as vicarious admissions. But Gersh's statements to Corriston were contemporaneous with and integrally and causally related to the conduct of the conspirators in the black market activities. Reason, justice and precedent all point to the conclusion that the statements are admissible as part of the res gestae of the conspiracy.

II.

If this Court agrees that the questions of the law of evidence warrant certiorari, it need have no hesitancy because of the passages of the lower court's opinion that the newly discovered evidence would not have affected the result.

The importance of the newly discovered evidence was aptly described by Justice Douglas (Appendix B):

> "The motion for a new trial was accompanied by an affidavit of one Corriston. He offered testimony which appears to be probative of a crucial fact issue in the case—whether Wolcher gave large sums of cash to one Gersh as over-ceiling payments for black market whiskey, thus violating one federal law but accounting for the disposition of the funds on which he failed to pay the income tax. * * * *If the evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case.*" (Emphasis added.)

The opinion of the court of appeals below reveals that it completely misunderstood the facts of the case and what the total evidence would consist of on a new trial. This doubtless was due to the lack of any analysis

or findings as to the facts and evidence by the district judge. The court of appeals did not have or seek the trial judge's exercise of discretion as to the facts on the assumption that the newly discovered evidence was admissible. On the assumption that the newly discovered evidence was inadmissible, the district judge did not analyze or make findings as to the factual background, but merely held that there was no legal basis for granting the motion. The court of appeals was apparently unaware of the fact that the totality of the evidence on a new trial involved consideration of the testimony and documentary evidence established by Government witness Gersh at the first trial but not part of the record of the second trial. The true and complete factual background makes it clear that the newly-discovered evidence—if admissible—was of the utmost significance.

1. The court of appeals mistakenly understood that petitioner's defense "was simply that *he made no profits*" (italics by the court), and found implausible an assertion that he would engage in black market activities without any gain.

On the contrary, petitioner testified that his black market activities resulted in profits at the retail level by the Wolcher taverns; what he denied was any profits by him at the wholesale level in selling whiskey by the case. He testified that "there was a profit made, but not from the sale of the liquor by the case as such." (R. 14109, pp. 409-410).

Petitioner's assertion was not merely that the Wolcher taverns were thereby enabled to get whiskey, but was further that, instead of paying black market prices, they were enabled to obtain the whiskey at

ceiling. This was possible only because petitioner's black market profits absorbed what would otherwise have been losses on sales at ceiling to the Wolcher taverns. These taverns concededly made substantial profits as a result of petitioner's black market activities. Their purchases at ceiling prices instead of black market prices was worth over $17,500. But there has not been any suggestion, and there could be none, of understatement of income in the returns for these taverns.

2. In commenting as to the facts without any guidance from the district judge, the court below erred in asserting that at a new trial petitioner's defense would rest solely on his uncorroborated testimony as to the disposition of a large portion of the black market moneys he admittedly received.

a. First, the court palpably erred in asserting that petitioner had been "illegally receiving some $200,000." That figure jumbles together the ceiling price, which the outside tavern owners paid by check to the San Francisco wholesaler, and the cash overage which was received by petitioner. Mr. Schnacke's summation shows that the proof established cash receipts to petitioner of only $88,853.71 on the Eastern whiskey, and only $6,150 on the West Coast whiskey. (See p. 5, supra.)

b. Second, the court below did not take into account the corroboratory significance of the evidence at the first trial. At the second trial it was established that petitioner made payments to Gersh by check of $47,500, and that Gersh repaid $35,000. The prosecutor in his summation both dismissed the $12,500 net thus paid to Gersh as minor and stressed that there was no

corroboration of petitioner's unsupported word that this was for black market whiskey payments. (R. 14919, pp. 7-8.)

The evidence at the first trial, however, provides more extensive corroboration as to the amount of petitioner's payments to Gersh. First there is the direct corroboration: Gersh's documentary bank records, identified by Gersh, corroborated petitioner's testimony of cash mailings to Gersh of $8,300 in August 1943 and $30,000 in January 1944. Second, there is the corroboration when the disputed evidence at the first trial is viewed again in the light of Corriston's testimony. At the first trial the significant clash between Wolcher and Gersh concerning amounts paid to Gersh arose with respect to Wolcher's testimony that he personally delivered $60,000 to Gersh in November 1943—$30,000 in cash, and $30,000 in a bank draft. (R. 14109, pp. 360-361; Dft. Exh. F, pp. 371-2.) Gersh testified that he only handled the $30,000 draft for the purpose of cashing the check for petitioner. Gersh denied either having retained the $30,000 of the bank draft or having received the $30,000 in cash. Corriston's testimony clearly corroborates Wolcher on this receipt of $60,000 by Gersh for whiskey black market purchases. For only Wolcher's testimony—and not Gersh's—account for Gersh's ability to arrange for the $50,000 overage. And at the meeting attended by Corriston in November or December 1943, Gersh not only paid Taylor a $10,000 deposit, but also stated his intention to pay the balance of the necessary $50,000 out of cash on hand. Gersh's statement of intention is of course circumstantial evidence that he had that cash on hand. It is indeed circumstantial evidence that he later paid that cash to Taylor. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892).

At the first trial, although Gersh corroborated the receipt of large cash sums from petitioner through the mail, he testified they were sent to him to buy coin machines and that he returned the money. Wolcher's evidence to impeach Gersh's coin machine explanation was held erroneously rejected. Corriston's newly discovered evidence is more important than an impeachment of Gersh's "coin machine" explanation, since it affirmatively corroborates petitioner's account that the purpose was for whiskey black market payments.

With Corriston's corroboration of petitioner as to purpose, petitioner is able to call Gersh to identify the bank records corroborating the cash mailings without being trapped by the fact that petitioner's testimony as to purpose would be contradicted by Gersh, a fundamentally hostile witness, and would not be corroborated by any one else. And as already noted Corriston corroborates petitioner's testimony (denied by Gersh) of $60,000 paid to Gersh in November 1943.

3. At the second trial the jury recommended leniency even though the prosecutor tellingly pointed out to the jury that there was nothing but petitioner's unsupported word to show that he had sent any cash to Gersh, or that Gersh was in any way involved in the whiskey black market. (R. 14919, pp. 7-8.)

At a new trial petitioner could provide corroboration not only as to the purpose of his payments to Gersh, but also to amounts paid to Gersh equal to the vast bulk of petitioner's black market receipts to be accounted for.

Obviously it would be unjust to speculate that with such corroboration the jury would nevertheless convict petitioner, whose tax return showed income of

$66,950, because the corroboration, though extensive, does not extend to every dollar of payment testified to by petitioner, such as the $3,000 cash delivered to Gersh in 1944. That was not the basis on which conviction was obtained. The corroboration of the main points and great bulk of petitioner's testimony obviously supports his testimony as a whole. The extensive corroboration would at a minimum negative guilt beyond a reasonable doubt.

Because of its erroneous factual assumptions, the court of appeals misunderstood the significance of the newly discovered evidence in the total setting of the evidence available at a new trial. In Judge Chesnut's phrase, the newly discovered evidence would be "substantial in the perspective of the case as a whole." *United States* v. *Frankfeld*, 111 F. Supp. 919, 923 (D. Md. 1953.)

In view of the erroneous underlying assumptions, the court's factual discussion is no bar to the issuance of the writ to review the important legal rulings on the admissibility of the evidence tendered.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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